No. 548

In the Supreme Court of the United States

OCTOBER TERM, 1968

RODERICK JENKINS,

Appellant,

v.

JOHN JULIAN McKEITHEN, CECIL MORGAN, PAUL M. HEBERT, FLOYD C. BOSWELL, RALPH F. HOWE, A. R. JOHNSON, III, AND BURT S. TURNER,

Appellees.

On Appeal From The United States District Court, Eastern District of Louisiana

ORIGINAL BRIEF ON BEHALF OF APPELLEES

JACK P. F. GREMILLION,
Attorney General,
State of Louisiana,
Baton Rouge, Louisiana.

ASHTON L. STEWART,
Special Assistant Attorney
General of the State of Louisiana,
604 Union Federal Building,
Baton Rouge, Louisiana 70801.

Attorneys for Appellees.

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May it Please the Court:

QUESTIONS PRESENTED

Appellees, being dissatisfied with the presentation by appellant of the questions presented for review, make this statement thereof:

1. Does this plaintiff have standing to attack the constitutionality of the statute creating an investigatory commission, on the grounds that its procedures deny due process to witnesses subpoenaed to appear before it, when this plaintiff has not been subpoenaed and does not anticipate that he will be subpoenaed?

2. Is a state statute unconstitutional which creates a commission to investigate possible violations of criminal laws, where the commission is limited to investigation and fact finding only, and is not authorized to adjudicate or make binding determinations which directly affect legal rights of individuals, on the grounds that the person subpoenaed as a witness, or who is being investigated, is not given all rights of a defendant in a criminal prosecution?

3. Do the acts of a district attorney in filing claimed false criminal charges against plaintiff, or the claimed plotting of state officials to kill other people, serve as grounds to declare a state statute creating a commission to investigate possible violations of criminal laws unconstitutionally administered, where the commission does not have any authority, supervision or control of such district attorney, and the claimed plotting of state officials to kill six other people has no causal connection with the administration of such statute?

STATEMENT OF THE CASE

Appellees make this their statement of the case as they deem it necessary in view of the omissions in that of appellant:

The statute, here sought to be declared unconstitutional, created the Labor-Management Commission of Inquiry because, in accordance with preamble of the statute, of the "unprecedented conditions" existing in the State of Louisiana, "under which there has been a shut-down of construction work involving industrial

development projects giving employment to thousands of persons and vitally affecting the public interest and threatening the orderly conduct of normal labor-management relations." (A-102). The Commission was only authorized to investigate "allegations and accusations of violations of the state and federal criminal laws" "in connection with the conditions above referred to", "in order to supplement and assist the efforts and activities of the several district attorneys, grand juries and other law enforcement officials and agencies of the State of Louisiana and of the United States" (A-103).

The Commission was to investigate and report only, as the statute provided,

> "it shall be investigatory and fact-finding only" (A-105)

and

> "The Commission shall have no authority to and it shall make no binding adjudications ***. No findings, conclusions, recommendations or reports of the commission may be used as prima facie or presumptive evidence of the guilt or innocence of any person in any court of law." (A-107)

and

> "Copies of its report shall be immediately furnished to the governor, the lieutenant governor, the attorney-general and the legislature." (A-107)

The attack on the constitutionality of the statute is that "*a person subpoenaed* before this trial agency as a potential accused or as a witness" (Emphasis sup-

plied) (Appellant's brief—5) is denied due process and equal protection of the laws because such a *person* is "denied the right to the effective assistance of counsel, to examine and cross-examine the witnesses against him, to compulsory process for the attendance of witnesses in his behalf, to the benefit of effective and meaningful rules of evidence and to the benefit of meaningful and definable standards of guilt or innocence." (Appellant's brief—5)

The appellant, however, has not alleged in his complaint that *he personally* has been, or that he anticipates that *he personally* will be, "*a person subpoenaed*" to appear before the Labor-Management Commission of Inquiry "as a potential accused or as a witness".

The appellant does allege that prior to his filing of this complaint, the District Attorney of the Eighteenth Judicial District of the State of Louisiana for the Parish of Iberville had filed bills of information charging appellant with criminal conspiracy to commit a battery. He also alleges facts as to other persons. The statute under attack does not vest the Commission with any authority, supervision, or control of such District Attorney. The statute does provide "with respect to any of its findings, the commission may request the governor to refer the matter to the attorney general asking that he exercise the full authority conferred by Article VII, Section 56 of the Constitution in causing criminal prosecutions to be initiated in accordance with law." (A-108). Said Article VII, Section 56 of the Constitution of Louisiana provides that

the attorney general "shall exercise supervision over the several district attorneys throughout the State."

The only other provisions of the statute relative to any action that the Commission might take are that "it shall report its findings and recommendations to the proper federal and state authorities *** charged with the responsibility for prosecution of criminal offenses." (A-108), and "when directed to do so by the commission, the chairman shall file appropriate charges with the state and federal authorities having jurisdiction." (A-108).

The appellees filed a motion to dismiss the complaint on the grounds: (1) that the appellant lacked standing to attack the constitutionality of the statute, (2) that the statute was constitutional, and (3) that the complaint failed to state a claim under which a court of equity should enjoin a criminal prosecution. (A-20).

The three judge district court, after a hearing, granted the motion to dismiss (286 F. Supp. 537) on the grounds that the statute was constitutional under *Hannah v. Larche*, 363 U.S. 420, 80 S. Ct. 1502, 4 L. Ed 2d 1307.

SUMMARY OF ARGUMENT

The plaintiff in his claim of unconstitutionality of the statute creating the Commission sues only as a citizen and not "as a potential accused or as a witness". He claims, however, that "a person subpoenaed" to testify before the Commission is denied "due process" in that a witness is denied the rights of an accused in a criminal prosecution. The defendants say that the

plantiff does not have standing to bring this action, as he is neither a potential accused or a potential witness.

The plaintiff claims the statute is unconstitutional, for as he claims, a potential witness before the Commission is denied the rights of an accused in a criminal prosecution. The defendants say that inasmuch as the statute created the Commission to investigate and report only, and as the statute prohibits the Commission from adjudicating or making determinations which directly affect legal rights of any person, that under the jurisprudence of this Court, a witness is not entitled to the full panoply of judicial procedures, and the statute is constitutional.

The plaintiff claims the statute is discriminatorily administered, but the only allegations to support such claims have to do with matters wholly irrelevant and without causal relation with the administration of the statute.

ARGUMENT

I.

LACK OF STANDING OF PLAINTIFF TO QUESTION CONSTITUTIONALITY OF STATUTE

The plaintiff alleges only that he is a citizen of the United States, and of the State of Louisiana, and that he works as a laborer and is a member of a labor union, and with only such standing makes defendants herein the Governor of the State of Louisiana and six of the nine members of the Labor-Management Commission

of Inquiry. This Commission was created by the Legislature of Louisiana as Act 2 of the Extra Session of Louisiana for the year 1967 (La. Revised Statutes Title 23, Sections 880.1 through 880.18) (A-102). The plaintiff prays that said statute be declared unconstitutional and that defendants be enjoined from enforcing the provisions of said statute against him.

Plaintiff does *not* allege that he personally has been, or that he anticipates that he personally will be, subpoenaed to appear before said Commission "as a potential accused or as a witness." Plaintiff, however, contends, as a basis for his attack on the statute, that the statute is unconstitutional because it denies "a person subpoenaed" before the Commission due process, that is, that "a person subpoenaed" before the Commission is "denied the right to the effective assistance of counsel, to examine and cross-examine the witnesses against him, to compulsory process for the attendance of witnesses in his behalf, to the benefit of effective and meaningful rules of evidence, and the benefit of meaningful and definable standards of guilt or innocence." (Appellant's brief—5).

The statute attacked, in its preamble (A-102), sets forth: "unprecedented conditions presently exist in the state under which there has been a shut-down of construction work involving industrial development projects giving employment to thousands of persons and vitally affecting the public interest and threatening the orderly conduct of normal labor-management relations", and "in connection with the conditions above referred to, there have been allegations and accusations

of violations of the state and federal laws which should be thoroughly investigated in the public interest", and "in order to supplement and assist the efforts and activities of the several district attorneys, grand juries and other law enforcement officials and agencies of the State of Louisiana and of the United States, it is imperative that additional investigative facilites on a statewide basis be made available.", "it is essential that *** the facts causing or contributing to such conditions may be investigated". The statute then created the Labor-Management Commission of Inquiry with authority to investigate criminal violations in the labor-management area, and report only, viz:

> "it shall be investigatory and fact finding only" (La. R.S. 23:880-6) (A-105).
>
> "The commission shall have no authority to and shall make no binding adjudication." (La. R.S. 23:880-7) (A-107).
>
> "No findings, conclusions, recommendations or reports of the commission may be used as prima facie or presumptive evidence of the guilt or innocence of any person in any court of law." (La. R.S. 23:880-7) (A-107).

The jurisprudence of this Court is well settled that this plaintiff does not have the right to attack the constitutionality of this statute as he does not show injury to himself under the statute. The very basis of plaintiff's attack does not apply to him. And even if this Court decreed the statute unconstitutional, such a judgment would not give plaintiff any redress. Plaintiff does not allege that he is one who is "immedi-

ately harmed, or immediately threatened with harm", by the claimed challenged action of the Commission in denying "a person subpoenaed" "as a potential accused or as a witness" the due process of an accused in a criminal proceeding. We quote from *Poe v. Ullman*, 367 U.S. 497, 6 L. Ed 2d 989, 81 S. Ct. 1752, a holding, which it relied on and followed, viz:

> " 'The best teaching of this Court's experience admonishes us not to entertain constitutional questions in advance of the strictest necessity.' " Parker v. County of Los Angeles, 338 US 327, 333, 94 L ed 114, 147, 70 S Ct 161. See also Liverpool, N.Y. & P.S.S. Co. v. Emigration Comrs. 113 US 33, 39, 28 L ed 899, 901, 5 S Ct 352.
>
> 'The various doctrines of 'standing', 'ripeness,' and 'mootness', which this Court has evolved with particular, though not exclusive, reference to such cases are but several manifestations—each having its own 'varied application'—of the primary conception that federal judicial power is to be exercised to strike down legislation, whether state or federal, only at the instance of one who is himself immediately harmed, or immediately threatened with harm, by the challenged action."

This Court said in *U.S. v. Raines*, 362 U.S. 17, 4 L. Ed 2d 524, 80 S. Ct. 519, viz:

> "This Court, as is the case with all federal courts, has no jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies. In the exercise of that jurisdiction, it is bound by two rules, to

which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." Liverpool, N.Y. & P.S.S. Co. v. Commissioners of Emigration, 113 US 33, 39, 28 L ed 899, 901, 5 S Ct 352. Kindred to these rules is the rule that one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional."

But the plaintiff argues that he brings this action for himself and "those similarly situated." This complaint cannot qualify as a Class Action, for the Rules of Civil Procedure require, viz:

> Rule 23 (a) Prerequisites to a Class Action. "One or more members of a class may sue * * * as representative parties on behalf of all only if * * * (3) the claims * * * of the representative parties are *typical* of the claims * * * of the class * * *." (Emphasis supplied)

Plaintiff's claim is not representative, as he has not been subpoenaed. For that matter, plaintiff has not alleged that any of "those similarly situated" have been subpoenaed.

In the case of *Bailey v. Patterson*, 369 U.S. 31, 7 L. Ed. 2d 512, 82 S. Ct. 549, this Court held that persons "cannot represent a class of whom they are not a part". Thus, even if it could be eked out of the com-

plaint that some of "those similarly situated" had been subpoenaed, this plaintiff cannot challenge the statute for them, as he has not been subpoenaed. We quote from that case, viz:

> "Appellants lack standing to enjoin criminal prosecutions under Mississippi's breach-of-peace statutes, since they do not allege that they have been prosecuted or threatened with prosecution under them. They cannot represent a class of whom they are not a part. McCabe v. Atchison, T. & S. F. R. Co. 235 US 151, 162, 163, 59 L ed 169, 174, 35 S Ct 69."

The district court held that this suit was not a class action.

We submit that the plaintiff is without standing to question the constitutionality of this statute.

II.

STATUTE IS CONSTITUTIONAL

The Louisiana Legislature in Special Session called for that purpose in 1967 enacted Act 2 (La. R.S. 23:880.1-880.18) (A-102) creating a "Labor-Management Commission of Inquiry" to investigate and find facts relating to violations or possible violations of the criminal laws of Louisiana or of the United States in the field of labor-management.

In accordance with the declarations in said Act as to the reasons for the enactment thereof, there were: (1) unprecedented conditions then existing in the state, under which there was a shut-down of construction work, involving industrial projects giving employ-

ment to thousands of people, vitally affecting the public interest, and threatening the orderly conduct of normal labor-management relations; (2) and, in connection with said conditions, it was imperative that *additional investigative facilities on a state-wide basis* be made available to investigate the allegations of state and federal criminal law violations, in order to supplement the several district attorneys and grand juries of the State, and to report to the Legislature and the Governor for action within their scope.

The Commission is composed of nine members appointed by the Governor, with three of such members being respectively from the public, labor and management. The Commission was authorized to "ascertain the facts" and "make findings with respect to any actual or probable violations of the criminal laws" in the labor-management area. The statute specifically limited the Commission to investigations and said, viz:

> *"it shall be investigatory and fact finding only"*. (La. R.S. 23:880.6) (Emphasis supplied) (A-105)
>
> *"The Commission shall have no authority to and shall make no binding adjudication* * * *; however, it may, in its discretion, include in its findings the conclusions of the commission as to specific individuals or as to the general situation, or as to both, and it may make such recommendations for action to the governor as it deems appropriate. * * *. *No findings, conclusions, recommendations or reports of the commission may be used as prima facie or presumptive evidence of the guilt or innocence of any person in any court*

of law." (La. R.S. 23:880.7) (Emphasis supplied) (A-107-8)

The Commission was required to report its findings to the Legislature and the Governor, etc., who could act thereon within their scope if they saw fit. We quote from the statute, viz:

> "Copies of its report shall be immediately furnished to the governor, the lieutenant governor, the attorney-general and the legislature." (La. R.S. 23:880.7) (A-107)

The claimed basis of the attack on said statute is that it denies plaintiff "due process" as guaranteed by the Fourteenth Amendment to the U. S. Constitution, because it is claimed that "there is denied to a person compelled to appear before said Commission" to testify, the right of counsel, confrontation of witnesses against him, process for witnesses, etc.

(a)

SIXTH AMENDMENT THROUGH FOURTEENTH AMENDMENT

Any contention by plaintiff that the Fourteenth Amendment makes the Sixth Amendment applicable to these proceedings is clearly without substance. The Sixth Amendment is applicable to "*criminal prosecutions*", and the investigatory proceedings of this Commission are not criminal prosecutions. The Sixth Amendment requires that *in a criminal prosecution* the accused,

> "* * * be confronted with the witnesses against him; to have compulsory process for obtaining

witnesses in his favor, and to have the assistance of Counsel for his defense."

In the case of *U. S. v. Zucker*, 161 U.S. 475, 40 L. Ed. 777, 16 S. Ct. 641, this Court said, viz:

> "The 6th Amendment relates to a prosecution of an accused person which is technically criminal in its nature."
>
> * * *
>
> "The words in the 6th Amendment, 'to be informed of the nature and cause of the accusation,' obviously refer to a person accused of crime, whether a felony or misdemeanor, for which he is prosecuted by indictment or presentment, or in some other authorized mode which may involve his personal security. So the clause declaring that the accused, in a criminal prosecution, is entitled 'to be confronted with the witnesses against him,' has no reference to any proceeding (although the evidence therein may disclose, of necessity, the commission of a public offense) which is not directly against a person who is accused, and upon whom a fine or imprisonment or both may be imposed."

In the case of *Hannah v. Larche*, supra, this court in a case involving an investigatory commission, which did not adjudicate, just as the present commission only investigates and cannot adjudicate, held that the Sixth Amendment was not there applicable, viz:

> "Although the respondents contend that the procedures adopted by the Commission also violate their rights under the Sixth Amendment, their claim does not merit extensive discussion. That

> Amendment is specifically limited to 'criminal prosecutions', and the proceedings of the Commission clearly do not fall within the category."

In *Escobedo v. Illinois*, 378 U.S. 478, 12 L. Ed 2d 977, 84 S. Ct. 1758 the question was as to the beginning of a "criminal prosecution" which would fix the time when the Sixth Amendment would apply. In that case this Court recognized that under *Gideon v. Wainwright*, 372 U.S. 335, 9 L. Ed. 2d 799, 83 S. Ct. 792, the Sixth Amendment's provision, that in all "*criminal prosecutions*" the accused shall enjoy the right to have the assistance of counsel for his defense, was made obligatory upon the states by the Fourteenth Amendment. This Court in Escobedo then held that the beginning of the prosecution did not have to wait for the formal indictment to fix the time when an accused was entitled to counsel, and held that criminal prosecution in reality commenced when the process focused on the person up to such time being investigated, and its purpose then changed from investigation to an effort to elicit a confession. We quote, viz:

> "We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and has been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied

'the Assistance of Counsel' in violation of the Sixth Amendment to the Constitution as 'made obligatory upon the States by the Fourteenth Amendment,' Gideon v. Wainwright, 372 US, at 342, 9 L ed 2d at 804, 93 ALR2d 733, and no statement elicited by the police during the interrogation may be used against him at a criminal trial."

The specific holding in Escobedo is not applicable to this statute, even to a person subpoenaed to testify before the Commission, as the Statute recognizes the right to assistance of counsel by a witness, viz:

"La. R.S. 23:880.10—Rights of Witnesses; right to counsel. * * *

"B. A witness summoned to appear before the commission shall have the right to be accompanied by counsel, who may advise him of his rights * * * *"

(A-113).

We submit that the Sixth Amendment through the Fourteenth Amendment is not applicable to this statute, as the investigation authorized by this statute is not a "criminal prosecution", and even if it were, as to the right of counsel, under Escobedo, the statute provides for the right of counsel.

(b)

FIFTH AMENDMENT THROUGH FOURTEENTH AMENDMENT

The Fifth Amendment provision that "no person * * * shall be compelled in any criminal case to be a witness against himself * * *" is complied with by the

statute as this immunity from self-incrimination is recognized by the statute, (La. R.S. 23:880.13) (A-115).

We submit that this statute fully recognizes the rights of a witness under the Fifth Amendment through the Fourteenth Amendment.

(c)

FOURTEENTH AMENDMENT DUE PROCESS

The plaintiff argues that the statute denies "due process" as required by the Fourteenth Amendment by denying to a "person compelled to appear before said Commission" to testify, the right of counsel, confrontation, process, etc. The plaintiff also claims the statute, for the same reasons, denies "privileges and immunities" and "equal protection of the law" as also guaranteed by the Fourteenth Amendment. As the basis for the attack on the statute is that it denies counsel, confrontation, process, etc., we will treat all such contentions as a claim that "due process" has been denied.

The case of *Hannah v. Larche*, supra, *is decisive* of this issue. By comparison, the rules of procedure here attacked are identical with the rules of procedure that were under attack before this Court there. There the commission was held to be "purely investigative and fact-finding". Here the commission is likewise "investigatory and fact finding only". There, this Court found that the commission

"* * * *does not adjudicate.* It does not hold trials or determine anyone's civil or criminal liability. It does not issue orders. Nor does it indict, punish, or impose any legal sanctions. It does not make determinations depriving anyone of his life, liberty, or property. In short, the Commission does not and cannot take any affirmative action which will affect an individual's legal rights. The only purpose of its existence is to find facts which may subsequently be used as the basis for legislative or executive action."

The present statute likewise does not permit the Labor-Management Commission of Inquiry to adjudicate ("The commission shall * * * make no binding adjudication" La. R.S. 23:880.7) (A-107). The Labor-Management Commission does not hold trials or determine anyone's civil or criminal liability ("it shall be investigatory only" La. R.S. 23:880.6) (A-105) It does not issue orders (id.). Nor does it indict, punish, or impose any legal sanctions (id.). It does not make determinations depriving anyone of his life, liberty, or property ("no findings * * * may be used as prima facia or presumptive evidence of the guilt or innocence of any person in any court of law" La. R.S. 23:880.7 (A-107). In short, the Labor-Management Commission does not and cannot take any affirmative action which will affect an individual's legal rights. The only purpose of its existence is to find facts which may be used as the basis for legislative or executive action as the statute only provides that the Commission's reports,

"shall be immediately furnished to the governor,

> the lieutenant governor, the attorney-general and the legislature". (La. R.S. 23:880.7) (A-107)

This Court there held that when governmental action does not partake of an adjudication, in a case such as here, when a general fact-finding investigation is being conducted, it is not necessary that the full panoply of judicial procedures be used, and that since that commission did not adjudicate, it was not bound by adjudicatory procedures.

But, the plaintiffs in that case, just as the plaintiff here, contended that the commission's proceedings

> "might irreparably harm those being investigated by subjecting them to public opprobrium and scorn, the distinct likelihood of losing their jobs, and the possibility of criminal prosecutions."

That is the heavy argument of this plaintiff. This Court answered that contention there by saying that *such consequences would only be collateral* and would not affect the legitimacy of the Commission's investigative function. We quote, viz:

> "However, even if such *collateral consequences* were to flow from the Commission's investigations, they would not be the result of any affirmative determinations made by the Commission, and they would not affect the legitimacy of the Commission's investigative function." (Emphasis supplied)

On the point that a legitimate investigative function could not be thwarted because of some possible collateral consequences, this Court there cited *Sinclair v. United States,* 279 U.S. 263, 73 L. Ed. 692, 49 S. Ct.

268, holding that Congress' legitimate right to investigate was not affected by the fact that information disclosed at the investigation might have been used in a subsequent criminal prosecution. This Court there said, viz:

> "It may be conceded that Congress is without authority to compel disclosures for the purpose of aiding the prosecution of pending suits; but the authority of that body, directly or through its committees, to require pertinent disclosures in aid of its own constitutional power, is not abridged because the information sought to be elicited may also be used in such suits."

This Court also cited *McGrain v. Daugherty*, 273 U.S. 135, 71 L. Ed. 580, 47 S. Ct. 319, which held that a regular congressional investigation was not rendered invalid merely because it might possibly disclose crime or wrongdoing on the part of witnesses summoned to appear at the investigation. This Court there said, viz:

> "Nor do we think it a valid objection to the investigation that it might possibly disclose crime or wrongdoing on his part."

The preamble of the statute here, setting forth unprecedented conditions, called for those in charge of government in Louisiana to do something about the situation. In order to act, the Legislature needed facts. In order to act, the Governor needed facts. The highest purpose of government is law and order and this Commission was to investigate to ascertain facts to aid those in charge of government to maintain law and order.

This Court in *Hannah* said that one of the considerations in determining "due process" in investigating procedures was the possible burden of applying judicial procedures. It said, viz:

> "On the other hand, the investigative process could be completely disrupted if investigative hearings were transformed into trial-like proceedings, and if persons who might be indirectly affected by any investigation were given an absolute right to cross-examine every witness called to testify. Fact-finding agencies without any power to adjudicate would be diverted from their legitimate duties and would be plagued by the injection of collateral issues that would make the investigation interminable. Even a person not called as a witness could demand the right to appear at the hearing, cross-examine any witness whose testimony or sworn affidavit allegedly defamed or incriminated him, and call an unlimited number of witnesses of his own selection. This type of proceeding would make a shambles of the investigation and stifle the agency in its gathering of facts."

Hannah then noted that the rules of procedure for that commission were not historically foreign to other forms of investigation in our country, and said, viz:

> "Far from being unique, the Rules of Procedure adopted by the Commission are similar to those which, as shown by the Appendix to this opinion, have traditionally governed the proceedings of the vast majority of governmental investigating agencies."

And those are the same rules of procedure fixed for

the Labor-Management Commission by the statute here attacked.

This Court discussed in *Hannah* numerous executive and legislative investigating commissions and demonstrated that where a commission did not adjudicate, cross-examination by a witness of other witnesses was not permitted. For example, the Court noted that the Commission's rules of procedure were the same as the U. S. House of Representatives "fair play" committee rules. Those are the same rules adopted for this Labor-Management Commission. We quote from *Hannah*, viz:

> "After extensive debate and hearings, HR 6127 was finally passed by both Houses of Congress, and the House "fair play" rules, which make no provision for advance notice, confrontation, or cross-examination, were adopted in preference to the more protective rules suggested in S. 83."

This Court, *in Hannah*, referred to the procedures before grand juries. We quote, viz:

> "Having considered the procedures traditionally followed by executive and legislative investigating agencies, we think it would be profitable at this point to discuss the oldest and, perhaps, the the best known of all investigative bodies, the grand jury. It has never been considered necessary to grant a witness summoned before the grand jury the right to refuse to testify merely because he did not have access to the identity and testimony of prior witnesses. Nor has it ever been considered essential that a person being investigated by the grand jury be permitted to come before that body

and cross-examine witnesses who may have accused him of wrongdoing. Undoubtedly, the procedural rights claimed by the respondents have not been extended to grand jury hearings because of the disruptive influence their injection would have on the proceedings, and also because the grand jury merely investigates and reports. It does not try."

This Court concluded in *Hannah*, viz:

"*Thus, the purely investigative nature of the Commission's proceedings, the burden that the claimed rights would place upon those proceedings, and the traditional procedure of investigating agencies in general, leads us to conclude that the Commission's Rules of Procedure comport with the requirements of due process.*" (Emphasis supplied)

The identical attack here made on this statute creating the Labor-Management Commission was made in the Louisiana courts in the case of *Martone v. Morgan*, 251 La. 993, 207 So. 2d 770; appeal to this Court (No. 216) dismissed on October 14, 1968, for want of a substantial federal question.—U.S.—21 L. ed. 2d 12, 89 S. Ct.—. The Louisiana Supreme Court dismissed the attack and held the statute constitutional. The attorney for the plaintiff in that suit is the same attorney representing the plaintiff in this complaint. The plaintiffs and courts have been changed, but the attack is otherwise identical.

As noted by the District Court in its opinion, (286 F. Supp. 537) (541), viz:

"The plaintiffs in the instant case have not been called as witnesses before the Commission, and to allow them, along with the many others whom they claim to represent, to cross-examine witnesses and present evidence to the Commission would certainly 'make a shambles of the investigation and stifle the agency in its gathering of facts. We need but to look at the lengthy pleadings filed herein by plaintiffs to conclude that the court in Hannah was right when it said that if investigative hearings were transformed into trial-like proceedings the fact finding agency would be 'plagued by the injection of collateral issues that would make the investigation interminable.' For example, the plaintiff Jenkins alleges, inter alia, that the Governor of the State of Louisiana, together with members of the Labor-Management Commission, including the Dean of the Louisiana State University Law School, the Dean of the Tulane Law School, the president of a local bank, and others 'have * * * singled out for murder * * * six members of the Teamsters Local No. 5 of Baton Rouge, Louisiana'. He further alleges that these same gentlemen are using their 'great arsenal of power' 'to destroy the current power structure of the labor union aforesaid' (Teamsters Local No. 5 headed by one Edward Grady Partin) 'and to install a new power structure oriented and subservient to the James R. Hoffa group or clique of the International Brotherhood of Teamsters, Chauffers, Warehousemen and Helpers of America.' The plaintiff Jenkins then alleges that these same defendants have caused the arrest of the said Edward Grady Partin on a charge of aggravated assault and that their action 'is but a

response to the announcement of the candidacy of Honorable Robert F. Kennedy for the nomination for the presidency of the United States by the Democratic Party of the United States, in that the conspirators herein are hoping thereby to induce Edward Grady Partin to recant his testimony heretofore given against James R. Hoffa, to be used as a basis to obtain a new trial for and the consequent release from prison of James R. Hoffa prior to the democratic presidential nomination, so as thereby to thwart the nomination of the said Robert F. Kennedy who, as Attorney General of the United States, ordered and managed the prosecution and conviction of the said James R. Hoffa.'

"These are but examples of the twenty-one pages of allegations contained in the complaint filed herein by Jenkins. These are the issues that plaintiffs would like to inject into Commission hearings, and these are the issues plaintiffs would like to air out in open court before this tribunal. The entire history of these proceedings convinces this Court that plaintiffs are far more interested in obtaining a forum in which to publicize their extraordinary allegations than in obtaining an adjudication of issues pertaining to the constitutionality of the Act involved. We decline to allow them to do so here.

"A careful reading of the Act shows that plaintiffs' analysis thereof, as set forth in rather strained and extreme terms in the complaints filed herein, is simply not an accurate analysis of the powers, duties, and functions of the Commission

created thereby. We conclude instead, that as stated in Hannah:

> "* * * the purely investigative nature of the Commission proceedings, the burden that the claimed rights would place upon those proceedings, and the traditional procedure of investigating agencies in general, leads us to conclude that the Commission rules of procedure comport with the requirements of due process.' 80 S. Ct. at 1519."

Appellees submit that the statute is constitutional.

But, even if some part of the procedures were unconstitutional, such would not authorize holding the entire statute unconstitutional, as it has a severability clause, which we quote, viz:

> "Section 3. If any provision or item of this Act or the application thereof is held invalid, such invalidity shall not affect other provisions, items or applications of this Act which can be given effect without the invalid provisions, items or applications, and to this end the provisions of this Act are hereby declared severable." (A-117).

III.

ACT NOT DISCRIMINATORILY ADMINISTERED

The plaintiff in his secondly numbered of questions presented, says that the allegations of the complaint show that the statute has been applied in a discriminatory manner against plaintiff as a member of a labor union. But plaintiff does not set forth any al-

legation, insofar as he is concerned, which avers any *causal connection* between the statute and the claimed actions alleged.

We assume that plaintiff's legal premise is, as recognized by the great case of *Yick WO v. Hopkins*, 118 U.S. 356, 30 L. Ed. 220, 6 S. Ct. 1064, that when an otherwise valid legislation is sought to be applied in an unconstitutional manner, the courts will not sustain such an application. In *Yick WO v. Hopkins*, the statute, though valid on its face, was so administered "with an evil eye and an unequal hand" as to make unjust and illegal discriminations between persons in similar circumstances, material to their rights.

We will now discuss the various allegations in the complaint so that it will readily be revealed that there is no causal connection between the actions alleged and the administration of the statute here under attack.

The first allegation (A-7) as to the acts of discrimination in the actions of the Labor-Management Commission of Inquiry is that,

> The district attorney, *while acting in concert with defendants herein*, filed criminal charges of criminal conspiracy to commit a battery against plaintiff, in the Eighteenth Judicial District Court of the State of Louisiana for the Parish of Iberville.

The constitution and laws of Louisiana are quite clear that the district attorney has entire charge and control over criminal prosecutions in his district, subject to the supervision of the Attorney General. Louisiana

Constitution Article 7, Sections 56, 58; La. Code of Criminal Procedure, Art. 61. *Kemp v. Stanley*, 204 La. 110, 15 So. 2d 1. The statute here attacked does not give the Labor-Management Commission of Inquiry any authority over the district attorney. Filing of these criminal charges against plaintiff was the act of the district attorney. Any holding here that the statute is unconstitutional could and would have no effect whatsoever on the district attorney in the prosecution of those charges. The Commission under the provisions of the statute is wholly without authority to require the district attorney to do anything. Therefore, we submit that the action of the district attorney in filing criminal charges against plaintiff is without any causal connection with the administration of the statute here sought to be declared unconstitutional. The claim that the district attorney acted "in concert with defendants" (A-7), under the law granting the district attorney solely the authority exercised, is wholly without substance. The fact that such charges, as claimed by plaintiff (A-8) might be without factual or legal basis, does not give them any causal connection with the Commission, as the Commission has no authority in connection with filing, prosecuting or dismissing said charges. The truth or falsity of the charges are matters before the court where the charges were filed and the defendants in administering the statute have no causal connection with them.

The next allegation by plaintiff is that the defendants have brought about the indictment and criminal prosecution of *other members* (not plaintiff) of plain-

tiff's labor union (A-10). The quick answer is that under the Constitution and laws of Louisiana, the grand jury is the only body authorized to indict, and the district attorney the only one authorized to prosecute, subject to the supervision of the Attorney General. (La. Code of Criminal Procedure, Articles 61, 443 et seq., La. Constitution, Art VII, Sec. 56, 58)

Then, by supplemental petition, the plaintiff made additional claims of discrimination by the Labor-Management Commision in administering the statute. The plaintiff alleged (A-24) that,

> (a) Six members, not including plaintiff, have been singled out for murder by "officials of the Labor-Management Commission of Inquiry of Louisiana."

This allegation has no causal connection with the administration of the statute here attacked. This claim plays no part in the investigation authorized by the statute. This allegation is so irrelevant, as well as preposterous, as it does not deserve further comment.

The next allegation is that a "*state trooper*" and an "Assistant Attorney General of Louisiana" and an "investigator" of the Commission appeared at the residence of Mr. Wade McClanahan, a member of the same labor union as plaintiff, and searched his house with a search warrant and arrested said Wade McClanahan under a warrant of arrest (A-25). Though the said allegations as to the arrest of McClanahan are embellished with such absurdities as the claimed actions of the "Assistant Attorney General" in pointing a "30-30

caliber rifle at the head of McClanahan's" four year old son, nevertheless, such search and arrest have no causal connection with the administration of the statute here attacked. The Commission has no authority under the statute to search or arrest. The persons who did search and arrest were police officers. These allegations were based on an affidavit of a Mrs. Imogene Wiley Coleman (A-33), filed in the record by plaintiff. Her deposition was immediately taken by defendants (A-67); she testified, viz:

> "Q. ***We are trying a lawsuit in which you have filed an affidavit, and I would like to examine you with reference to the facts which you have set forth in that affidavit. Do you know Mr. McClanahan, who just left the witness stand?
>
> "A. I refuse to answer that question." (A-69)

Mrs. Coleman pleaded the Fifth Amendment and would not answer any questions about executing the affidavit. Mrs. Wade McClanahan in her deposition, likewise took the Fifth and refused to answer any questions (A-74).

The same lack of causal connection with the administration of the statute is the next allegation (A-28), that searches under search warrants of the offices of the labor union and the residence of another person were made by those authorized by law to execute such warrants. The Commission has no authority to issue or obtain a search warrant, nor, for that matter, to execute a search warrant.

The next allegation is that defendants, "engaged the services of one Billy D. Miller to attempt to bribe

Wade McClanahan to give a false statement incriminatory of Edward Grady Partin."

The relevancy of this allegation to a claimed discriminatory application of the statute here attacked is entirely absent. The plaintiff filed an affidavit in the record with the clerk by Wade McClanahan (A-37), in purported support of and apparently as the sole basis of this claimed attempt to bribe; but in the deposition of Wade McClanahan (A-51) taken immediately thereafterward by defendants, he testified, viz:

> "Q. Did you, on or about May 2nd, 1968, sign an affidavit before William C. Bradley, Notary Public of the Parish of East Baton Rouge?
>
> "A. I refuse to answer that, ground of my constitutional right of the 5th Amendment, or anything I might say might be incriminating." (A-54)
>
> "A. *** I'll take the 5th Amendment on anything you ask me." (A-55)

The various acts pleaded are totally unreleated to the administration of the statute here attacked. These various acts pleaded were not performed in, nor did they have any causal connection with, the administration of the statute here attacked.

We submit that the statute is not subject to attack on the claim that it has been discriminatorily administered, as there are no allegations to support such a claim.

The plaintiff, in addition to praying that the statute be held unconstitutional because of its claimed discriminatory administration likewise sought an injunction under Title 42 USCA, Section 1981, 1983 and

1988, and we quote from the prayer in the complaint (A-12), viz:

> "(2) That a temporary restraining order *** issue *** restraining *** defendants *** from *** maintaining any action at law, civil or criminal, now pending in any of the courts of the State of Louisiana ***."

The plaintiff wants the court to enjoin his prosecution under the charges filed by the district attorney. The district court fully answered these contentions, and we quote that from its opinion (286 F. Supp. 537 (542)), viz:

> 'Reduced to essentials, the plaintiff, Jenkins, claims that he, who has not been called before the Labor-Management Commission of Inquiry, has nevertheless, as a result of hearings held by that Commission, been charged under four certain bills of information filed by the District Attorney of Iberville Parish, Louisiana, with criminal conspiracy to commit a battery with a dangerous weapon on four different people, all in violation of certain state statutes. He alleges that these charges are false and that he is not guilty. He alleges that he has not been tried as speedily as he would like, even though his own allegations certainly indicate no real violation of his constitutional right to a speedy trial. He alleges that these charges against him resulted from improper actions on the part of the Labor-Management Commission of Inquiry, and that there is no justification whatsoever for them having been filed against him. In other words, he alleges that he is not guilty.

"The plaintiff Sylvester merely claims that continued hearings by the Commission while charges are pending against him in Iberville Parish, Louisiana, will make it impossible for him to obtain an impartial jury for the trial of his case, and hence he seeks to have this Court enjoin all further hearings by the Commission so long as these charges against him are pending.

"All of these allegations of both plaintiffs are merely potential defenses to the criminal charges pending against them and may be urged if and when they are brought to trial on those charges. This Court must assume that the courts of Louisiana before whom plaintiffs' cases are pending will perform their duty and will see that the plaintiffs are given a fair and impartial trial and that all of their constitutional and statutory rights are respected. Unless and until the contrary is shown, the allegations made herein by these plaintiffs are premature, and do not state a claim upon which this Court could or should grant relief. As stated by the United States Supreme Court in Stefanelli v. Minard, 342 U.S. 117, 72 S.Ct. 118, 96 L.Ed. 138, concerning intervention of the federal courts in cases of this kind:

'If we were to sanction this intervention, we would expose every state criminal prosecution to insupportable disruption. Every question of procedural due process of law—with its far-flung and undefined range—would invite a flanking movement against the system of State courts by resort to the federal forum, with review if need be to this Court, to determine the issue. Asserted unconstitutionality in the impaneling and selection

of the grand and petit juries, in the failure to appoint counsel, in the admission of a confession, *in the creation of an unfair trial atmosphere*, in the misconduct of the trial court—all would provide ready opportunities, which conscientious counsel might be bound to employ, to subvert the orderly, effective prosecution of local crime in local courts. To suggest these difficulties is to recognize their solution'. (Emphasis supplied.)

"Plaintiffs argue that the teaching of Dombrowski v. Pfister, 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22, is controlling here. We disagree. None of the special circumstances noted in *Dombrowski* appear here. *Dombrowski* held that the statute there under attack operated on its face to abridge the plaintiff's First Amendment right of freedom of expression. The court there found that to force the plaintiff to wait and urge his defenses during his state court criminal trial would result in "a substantial loss or impairment of freedom of expression" in the meantime. Such is not the case here. *Dombrowski* is inapplicable."

CONCLUSION

We submit that the judgment below is correct and should be affirmed.

By attorneys,

JACK P. F. GREMILLION,
Attorney General,
State of Louisiana,
Baton Rouge, Louisiana.

ASHTON L. STEWART,
Special Assistant Attorney
General of the State of Louisiana,
604 Union Federal Building,
Baton Rouge, Louisiana 70801.

Attorneys for Appellees.

PROOF OF SERVICE

I, Ashton L. Stewart, Special Attorney General of the State of Louisiana, attorney for appellees herein and a member of the bar of the Supreme Court of the United States, hereby certify that on the _____day of February, 1969, I served a copy of the foregoing brief on the appellant herein, by mailing said copy in a duly addressed envelope with first class postage prepaid to his attorney of record, J. Minos Simon, Esquire, 1408 Pinhook Road, Post Office Box 52116, OCS, Lafayette, Louisiana, 70501.

Baton Rouge, Louisiana, this 20th day of February, 1969.

ASHTON L. STEWART,
Special Assistant Attorney General
of the State of Louisiana,
604 Union Federal Building,
Baton Rouge, Louisiana 70801

Attorney for Appellees